IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ROY WARDEN,
Plaintiff/Appellant,

v.

PHYLLIS RUSSELL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF ESPERANZA EN ESCALANTE; AINDREA MCCAMMON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS EMPLOYEE OF ESPERANZA EN ESCALANTE; AND ESPERANZA EN ESCALANTE, AN ARIZONA NONPROFIT CORPORATION,
Defendants/Appellees.

No. 2 CA-CV 2019-0159
Filed June 22, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20153232
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

Roy Warden, Tucson
In Propria Persona

Ogletree, Deakins, Nash, Smoak & Stewart P.C., Tucson
By Jim Mackie and Susan M. Wilson
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 Roy Warden appeals from the trial court's grant of summary judgment against him in a dispute regarding an agreement he made to use a garden space located on property belonging to Esperanza En Escalante ("EEE"). For the following reasons, we affirm.

Factual and Procedural Background

¶2 "When reviewing a grant of summary judgment, we view the evidence and reasonable inferences from it in the light most favorable to the nonmoving party." *Williams v. Baugh*, 214 Ariz. 471, ¶ 2 (App. 2007). In July 2013, Warden began residing at EEE, a transitional housing facility that provides temporary housing and support to homeless veterans in southern Arizona through the Veterans Administration's Grant and Per Diem program. Typically, veterans may reside at a Grant and Per Diem program such as EEE for a maximum of twenty-four months.

¶3 Before moving into EEE, Warden had a conversation with Phyllis Russell, EEE's executive director, in which he described his idea to begin a veteran-run community garden that would both engage veterans in gardening work and provide produce to other veterans in the greater Tucson community. Warden called this plan the Vets-Feeding-Vets ("VFV") project, and he expressed a desire to continue developing the garden within EEE after his residency there ended, as well as to eventually expand to other gardening locations outside of EEE.

¶4 Shortly after moving to EEE, Warden again discussed his VFV plan with Russell. Aindrea McCammon, Warden's case manager, also documented his idea to develop the VFV project in the EEE garden area as part of his veteran treatment plan.

¶5 Warden described his idea for the VFV project, including his hope it would continue after his residency at EEE ended. They did not discuss "every specific nuance" of Warden's use of the EEE garden, but Russell told him to "go for it." In a deposition, Warden attested he believed

the agreement meant EEE had "given up their use of the property by designating it to [him] for [his] project" as long as he acted in pursuit of the goals of the VFV program. He stated that he believed the agreement meant the EEE garden area could only be used for his project, gave him the right to set goals and rules for the garden space as long as he held up his end of the bargain by using the garden for the VFV project, and would be ongoing even after he completed his residence at EEE. However, Warden acknowledged that Russell never outlined specific terms for his use of the garden; she never specifically granted him exclusive use or authority over the garden area and, although Russell agreed he could use the garden after the conclusion of his EEE residency, she did not promise he could use the garden permanently.

¶6 Warden tended the garden during his tenure at EEE and engaged the participation of multiple fellow EEE residents. He also encountered at least one conflict regarding use of the garden area with another EEE resident, which resulted in intervention by EEE staff.

¶7 That disagreement occurred in March 2015, near the end of Warden's residence at EEE. By that time, EEE staff had been preparing for several months to assist Warden in moving to independent housing at a nearby apartment complex. Shortly after the disagreement, McCammon informed Warden that he would move out of EEE in April. The following day, Warden sent Russell a copy of a letter he had written to EEE's Veterans Administration liaison, which alleged the liaison had told Warden his funding for the new apartment would be jeopardized if he continued to pursue his VFV project at EEE. Russell responded in writing and assured Warden his funding and apartment placement would not be jeopardized by his VFV activities.

¶8 Warden moved to the new apartment but continued tending the garden at EEE. The following month, EEE limited Warden's access to the garden following an altercation with an EEE resident. In July 2015, Warden filed a complaint against EEE and several people associated with EEE including Russell and McCammon, alleging breach of contract, conspiracy, and First Amendment retaliation.

¶9 While that lawsuit was pending, Warden continued tending the EEE garden until, in early 2017, he was involved in a garden-related physical altercation with another EEE resident. EEE staff had to physically separate Warden and the other individual. Shortly after that altercation, EEE notified Warden he was no longer welcome on EEE property.

¶10 Meanwhile, Warden amended his complaint several times. The complaint in its final form alleged claims under theories of (1) promissory estoppel, (2) intentional infliction of emotional distress ("IIED"), and (3) conspiracy. EEE, Russell, and McCammon filed a motion for summary judgment, which the trial court granted after a hearing. The court explained that summary judgment was appropriate for Warden's promissory estoppel claim because "no reasonable person would find that the promise allegedly made to [Warden] was sufficiently specific or definite to be enforceable" and because the claim was barred by Arizona's statute of frauds, A.R.S. § 44-101. As to Warden's IIED claim, the court reasoned that the defendants' conduct "was not extreme or outrageous as a matter of law." Finally, the court ruled against Warden on his conspiracy claim "because a conspiracy claim must be based upon an actionable tort claim" and no actionable tort claims remained in the case.

Discussion

¶11 On appeal, Warden argues the trial court erred in granting summary judgment. Specifically, he argues he has provided writings and evidence that remove the agreement from the statute of frauds[1] and that the agreement was sufficiently definite to constitute an enforceable promise.[2] He further argues the court should not have ruled on a motion for summary judgment because certain facts were in dispute. Finally, he renews his claims of IIED and conspiracy.

¶12 "We review *de novo* whether summary judgment is warranted including whether any genuine issues of material fact exist and whether the

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[1]Warden also argues that because he fully performed his part of the agreement, the statute of frauds does not defeat his claim for promissory estoppel. However, Warden did not present this argument to the trial court, and therefore this issue is forfeited on appeal. *Webber v. Grindle Audio Prods., Inc.*, 204 Ariz. 84, ¶ 26 (App. 2002) ("[I]t is settled that an appeal is not the appropriate place to consider issues or theories not presented below.").

[2]Specifically, Warden argues this issue must be decided by a jury. Because we determine that the writing requirement of the statute of frauds would defeat the enforcement of any agreement here, we need not decide whether an enforceable agreement actually existed. However, even were it necessary to reach this issue, it would be waived because Warden cites no case law to support his argument. *See* Ariz. R. Civ. App. P. 13(a)(7)(A); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009).

superior court properly applied the law." *Melendez v. Hallmark Ins. Co.*, 232 Ariz. 327, ¶ 9 (App. 2013). We will affirm the trial court's determination if it is correct for any reason. *Id.*

Statute of Frauds

¶13 Arizona's statute of frauds generally prohibits actions seeking to enforce an agreement that cannot be performed within one year, unless the agreement is memorialized in writing and is signed by the parties bound by the agreement. § 44-101(5). The promise at issue here—to maintain an ongoing garden at EEE over the course of many years— falls within this provision. Nevertheless, Warden argues his agreement with Russell is not defeated by the statute of frauds because various documents in evidence satisfy the requirement that such agreements be memorialized and signed. We disagree.

¶14 The statute of frauds "avoids the assertion of claims based on 'uncertain memory and unrecorded expression,' that are not readily susceptible of proof." *Best v. Edwards*, 217 Ariz. 497, ¶ 19 (App. 2008) (quoting *Cottrell v. Nurnberger*, 47 S.E.2d 454, 464 (W. Va. 1948)). To that end, a writing must "state with reasonable certainty the subject matter to which the contract relates and the terms and conditions of all of the promises constituting the contract" to serve as an adequate memorialization under the statute. *Custis v. Valley Nat'l Bank of Phx.*, 92 Ariz. 202, 206 (1962). Also, the document must be "signed by the person to be charged" with the "intention of signing" it. *Bishop v. Norell*, 88 Ariz. 148, 151 (1960).

¶15 Warden conceded the parties never committed the agreement to a written contract, and he stated his discussion with Russell did not ensure "the I's [we]re dotted and the T's [we]re crossed." However, he argues the following documents adequately memorialize the alleged agreement: his veteran treatment plan, housing discharge papers from EEE, a client summary report including discussion of the garden dispute, McCammon's deposition, and Russell's declaration.

¶16 None of these writings satisfy the requirement of § 44-101 that an agreement be memorialized in writing and signed by the party to be bound. Nothing in the treatment plan, client summary report, or discharge papers suggests that either Russell or EEE intended to be bound to any terms with regard to the garden, nor do they outline any terms EEE must have abided with regard to the garden. The treatment plan describes the garden and VFV project as Warden's short- and long-term personal goals

toward employment and volunteering. Likewise, although the aftercare plan in Warden's EEE discharge document notes that he would "continue utilizing the EEE garden space to promote his [VFV] project" as long as he gave priority to current EEE residents and "maintain[ed] the therapeutic value of the garden," this statement does not indicate with certainty any terms or conditions whereby EEE would be bound to allow Warden unconditional dominion over the garden area so long as he promoted VFV. The client summary report notes specifically that Russell did not sign a contract with Warden regarding the garden project. And, neither McCammon's deposition testimony nor Russell's declaration provide the sort of timely written memorialization of an agreement contemplated by the statute of frauds, as both were created several years after the original agreement. *See Del Rio Land, Inc. v. Haumont*, 118 Ariz. 1, 6 (App. 1977).

Existence of Material Disputed Facts

¶17 Warden also argues the trial court improperly ruled on the motion for summary judgment because certain facts were in dispute. We determine de novo whether any issue of material fact exists, and we view the facts in the light most favorable to Warden, the non-moving party. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, ¶ 14 (App. 2012). But to prevail at trial, Warden would bear the burden of proof on his claims, and "summary judgment should be granted if the party opposing the motion has the burden of proof on an element at trial and has failed to present evidence creating a genuine issue of material fact as to that element." *Ruelas v. Staff Builders Pers. Servs., Inc.*, 199 Ariz. 344, ¶ 7 (App. 2001). "A 'genuine' issue is one that a reasonable trier of fact could decide in favor of the party adverse to summary judgment on the available evidentiary record." *Martin v. Schroeder*, 209 Ariz. 531, ¶ 12 (App. 2005) (quoting *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195 (App. 1990)).

¶18 Warden lists nine factual disputes he asserts are material to the judgment. Only one of these alleged facts—that an enforceable *quid pro quo* agreement existed regarding Warden's use of the garden—is material to the issues the trial court had to decide to rule on the motion for summary judgment. As we have explained, Warden did not provide the court with evidence sufficient to support the existence of an enforceable agreement. *See Portonova v. Wilkinson*, 128 Ariz. 501, 502 (1981) (party opposing summary judgment "must show that evidence is available which justifies going to trial"). The remainder of the "disputes" represent a variety of contentions and unsubstantiated allegations Warden has made over the course of this lawsuit.

Remaining Claims

¶19 Finally, Warden repeats his claims of IIED and conspiracy that he made in the trial court proceedings. However, he fails to develop any argument or cite any authority suggesting that the court erred in granting summary judgment on these claims; he has therefore waived that issue on appeal. Ariz. R. Civ. App. P. 13(a)(7); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009) ("Opening briefs must present and address significant arguments, supported by authority that set forth the appellant's position on the issue in question.").

Disposition[3]

¶20 For the foregoing reasons, we affirm.

[3] In his reply brief, Warden requests we impose sanctions upon appellees for their "material misrepresentations." But the record does not reflect that EEE has engaged in conduct warranting sanctions.